NEW RULES FOR B2B CONTRACTS: ARE YOUR BUSINESS CONTRACTS FUTURE PROOF?

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Recent Belgian legislation on B2B relations imposes new rules on the allowed content of business contracts.

PROHIBITION OF UNFAIR MARKET PRACTICES ABUSE OF ECONOMIC DEPENDENCE AND THE USE OF UNFAIR CONTRACT TERMS

With the act of 4 April 2019 on unfair market practices, the abuse of economic dependence, and unfair contract terms in B2B relations (the "Act"), the Belgian legislator has imposed some important restrictions regarding the content of business contracts.

The Act, amending the Belgian Code of Economic Law, is applicable to all businesses, regardless of size, type of contract (standard or customized contracts), or industry (a sole exception is made for financial services and public procurement contracts) and is expected to have a substantial impact on contracting practices. So far, Belgian contract law has been underpinned by principles of contractual freedom, according to which parties could freely establish the content of business contracts. Unfair contract terms were only subject to control in case of contracts concluded with consumers.

The new legislation now lays down a triple ban on:

- unfair market practices (starting from 1 September 2019);
- the abuse of economic dependence (starting from 1 June 2020);
- unfair contract terms (for agreements concluded, renewed, or amended after 1 December 2020).

The key points of the law are discussed below.

UNFAIR B2B MARKET PRACTICES

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While the concept of a prohibition on unfair market practices was already laid down in general terms in the Belgian Code of Economic Law, regarding B2B contracts, the Act expands its wording to prevent both misleading and aggressive market practices, inspired by Belgian consumer protection law.

Misleading market practices include all practices that involve incorrect information, leaving companies to be misled regarding important aspects of services or products. Aggressive market practices involve the use of coercion, physical violence, or undue influence, limiting a company's freedom of choice regarding to the intended business transaction.

Pursuant to these changes, businesses are now provided with similar remedies as consumers wishing to act against unfair commercial practices in a B2B context. Following hereto, the affected businesses will now be able to claim for damages or file for a cease and desist order.

ABUSE OF ECONOMIC DEPENDENCE

Alongside to the familiar prohibition on the abuse of a dominant position under Belgian competition law, the Act establishes a prohibition on abuse of the economic dependence of a company, which consists in the imbalance of power between businesses.

The legislation contains a non-exhaustive list of practices, which could be considered as abusive. Not only the abuse of a position of absolute market power, but also the abuse of relative market power towards other companies is thus prohibited and will give rise to new challenges between B2B relationships.

The Act defines a situation of economic dependence as "*a position of submission of a company to another company, characterized by the absence of a reasonable equivalent alternative, available within a reasonable time, under reasonable conditions and at reasonable costs, allowing these or each of these companies to impose obligations or conditions that cannot be obtained under normal market circumstances*".

For example, the law stipulates that such an abuse may be caused by:

- a refusal to purchase or sell;
- a direct or indirect imposition of unfair purchase or selling prices and/or quantities;
- the imposition of the acceptance by the other company of additional services which have no connection with the subject matter of the original agreement;
- unfair territorial restrictions, etc.

Apart from the competence of the Belgian Competition Authority, that will be able to impose fines up to 2% of the worldwide turnover of the abusing company, affected companies may also file for the annulment of a contract, claims for damages, or file a cease and desist order before the competent courts.

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UNFAIR CONTRACT TERMS IN B2B CONTRACTS

The Act introduces a general prohibition of unfair contract terms in B2B contracts, as well as two lists of presumed unfair contract terms, similar to the regime currently existing in relations with consumers.

A contractual term is regarded as unfair and prohibited if it creates, whether or not in combination with other contractual terms, a significant imbalance between the rights and obligations of the parties.

The law introduces a black list of clauses which are always deemed to be unfair and prohibited, without any possibility to prove the contrary, such as:

- clauses that create an irrevocable commitment for one of the parties while the performance of the obligations of the other party is subject to a condition, the realization of which depends exclusively on the will of that other party;
- clauses that allow for one of the parties to unilaterally interpret any clause in the contract;
- clauses that have one of the parties renounce all recourses in the event of a dispute.

A grey list contains clauses that are presumed to be unlawful, unless the company can proof the lawful character of the clause, such as:

- clauses that grant a company the right to modify the price, characteristics, or conditions of the contract unilaterally and without valid reason;
- clauses that tacitly extend or renew a fixed-term contract, without providing a reasonable notice period;
- clauses that inappropriately limit the rights of one of the parties in the event of total or joint non-performance or a defective performance by the other party of any of its contractual obligations;
- clauses that exempt one of the parties from their liability for wilful misconduct, gross negligence, or, except in cases of force majeure, for the non-performance of the essential obligations that are the object of the agreement;
- clauses that fix a compensation for non-performance or delay in the performance of one party's obligations, that is manifestly disproportionate to the prejudice that may be suffered by other party.

Unfair terms can be declared null and void on request of the affected party. The contract itself will remain valid and binding, unless it cannot reasonably continue to exist after the exclusion of the unfair term(s), in which case, the contract will equally be declared null and void.

CONCLUSION

In the light of abovementioned developments, undertakings may be confronted with certain difficulties and uncertainties regarding their existing contracts and the contracts they intend to conclude in the near future. With

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the most substantial legislative changes entering into force in the course of 2020, now might be the perfect time for a compliance check to ensure that your contracts and corporate principles are up to date.

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